

**Schmidlin, Inc. and Local Union No. 1076, International Brotherhood of Electrical Workers, AFL-CIO. Case 28-CA-18288**

June 30, 1994

**SECOND SUPPLEMENTAL DECISION AND ORDER**

BY MEMBERS STEPHENS, DEVANEY, AND BROWNING

On remand from the Board's Supplemental Decision and Order dated September 20, 1993, Administrative Law Judge David L. Evans issued the attached second supplemental decision on December 6, 1993. The Respondent filed exceptions and a supporting brief. The Charging Party filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the second supplemental decision and the record in light of the exceptions and briefs and has decided to adopt the judge's rulings, findings,<sup>1</sup> and conclusions<sup>2</sup> and to adopt the recommended Order.

**ORDER**

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Schmidlin, Inc., Toledo, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

<sup>1</sup> The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all of the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

<sup>2</sup> The Respondent excepts to the judge's finding that Kenneth Kuchinski was entitled to additional backpay for his work as a helper in 1986, prior to the time he became an apprentice. The Respondent argues, inter alia, that the Board's remand did not include Kuchinski and that the Board may not now grant additional backpay because the General Counsel did not except to the judge's failure in the original backpay proceeding to grant Kuchinski backpay prior to January 1987.

We disagree. Kuchinski, as a helper during the period in question, is within the scope of the Board's supplemental decision. The Board found that "some helpers and students" performed bargaining unit work and remanded to the judge to determine "which of these individuals" performed unit work and how much backpay was due.

*Richard F. Mack, Esq.*, for the General Counsel.  
*Terrance L. Ryan, Esq.*, of Cleveland, Ohio, for the Respondent.  
*John M. Roca, Esq.*, of Toledo, Ohio, for the Charging Party.

**DECISION**

DAVID L. EVANS, Administrative Law Judge. I enter the following findings and conclusions pursuant to the Board's remand order dated September 20, 1993.<sup>1</sup>

There is no evidence that James Cousino, Patrick Cousino, or John Couture performed any unit work during the backpay period. Charles Schmidlin admitted that the following employees did at least some unit work during the backpay period: helpers James Schmidlin and Erol Smolenski, and students Richard Bartkiewicz, Chris Strause, and Douglas Lynch. For purposes of computing the remedies for the students and helpers, the issues before me are:

A. With how many hours of heating and air-conditioning (unit) work during the backpay period should each student and helper be credited?

B. At what hourly rates, for wages and benefit funds, should the students and helpers be compensated?

*A. Hours of Unit Work*

Schmidlin<sup>2</sup> gave inexact, unsupported estimates of how much unit work James Schmidlin and Smolenski did; Schmidlin testified that James Schmidlin did unit work "maybe 20 percent" of the time; and Smolenski did unit work, "maybe a third" of the time. I have discredited Schmidlin on other matters; I have every reason to believe that his proprietary interest in this case colored these estimates, as well. I do not find these estimates by Schmidlin to be probative of anything. Schmidlin made no such estimates for Strause, Lynch, or Bartkiewicz; however, each of those three employees was called to testify by Respondent.

Bartkiewicz testified that he was a student and a part-time employee for the predecessor company, A-1 Schmidlin; he was not asked if he was also a part-time employee for Respondent Schmidlin, Inc., but the records appear to so indicate. He was detailed in his testimony; all his work was doing the heating and air conditioning work covered by the unit description. Whether Bartkiewicz can properly be considered a "student," for the purposes of determining the hourly rates, is another issue to be addressed below.

Student Strause, who alternated workweeks with student Lynch, testified on direct examination that he did only shop, nonunit, work. However, on cross-examination, Strause first acknowledged that he could remember four field jobs, two of which involved unit work. Then Strause acknowledged that, "more than four times," he assisted on a vacuum truck, a truck that was used in the field for other unit work. On redirect examination, Strause estimated the truck-helping jobs to have been "at least three," and he testified that they lasted about 2 hours each. Then Strause testified that the unit jobs which he had not originally admitted took 8 hours each. Strause was not a credible witness; for his own reasons, he was plainly attempting to limit the amount of exposure that Respondent has because of this case.<sup>3</sup>

<sup>1</sup> 312 NLRB 191.

<sup>2</sup> Each reference to "Schmidlin" is to owner Charles Schmidlin, rather than helper James Schmidlin, unless otherwise indicated.

<sup>3</sup> Bartkiewicz did the same, as discussed infra. However, the public interest to be served in this case is the paramount consideration, not the personal feelings of the individuals involved.

Student Lynch testified that he did unit, and nonunit, work; he was not asked by Respondent's counsel for any percentage estimates.

I have discredited the testimony of Schmidlin and Strause, and the testimony of Bartkiewicz, on this issue, was consistent with the specification. Therefore, I shall rely entirely on the records that were adduced at trial to make the required determinations of which students and helpers did unit work during the relevant period.

As noted in my original decision, for some employees Respondent's pre-1987 records do distinguish between unit and nonunit work; beginning in 1987, none of the records make the distinction. For the employees who were awarded remedy in my original decision, I noted that the 1987 records distinguished between "field" and other work; and I counted all field work as unit work, refusing to resolve the ambiguity in favor of the wrongdoer. Respondent's pre-1987 records do not distinguish between unit and nonunit, or even "field" and other work, for the students and helpers. Again the ambiguity will not be resolved in favor of the wrongdoer; I shall include all work as unit work in computing the remedies for the students and helpers.

#### B. Rates of Pay

There was no contractual job title of "student" or "helper." The contract contained only rates for journeymen and apprentices. The issue is whether the students and helpers should be compensated at the journeyman rate, the apprentice rate, or some other rate.

I reject the two extremes argued by the parties, the individually negotiated rates or the journeyman rates. Respondent was obviously using the individuals involved to circumvent its contractual obligations. The Board will not become a party to this abrogation of lawful duty by holding the employees to the individually negotiated rates and award no backpay to the students and helpers, as Respondent proposes. Neither will the Board act punitively and hold that, because the students and helpers were not in an apprenticeship program, they must be held entitled to remedy at journeyman rates, as General Counsel and the Union propose. The students and helpers were not licensed apprentices, but they were even less journeymen.

With two exceptions, James Schmidlin and Bartkiewicz, I find it appropriate to award to the students and helpers the lowest negotiated rates, those of apprentices in their first 8 months of an approved program. Except for James Schmidlin and Bartkiewicz, the employees, who were mostly working after school, were most unlikely to ever have been slotted at anything other than the lowest negotiated wage and benefit rates.<sup>4</sup>

The negotiated contract contains graduated wages and fund contributions for apprentices at 8-month intervals of employment. This is a negotiated agreement that even the least

skilled employees are worth more after 8 months. James Schmidlin worked a full 8 months by the end of the first quarter of 1986, and his remedy for that period is the same as the other students and helpers in their first 8 months of employment. Additionally, during three of the four quarters following the first quarter of 1986, James Schmidlin worked another 5 months. For that concluding period of his employment, I shall specify wages and benefits equivalent to the negotiated rate for an apprentice's second 8-month period of employment.<sup>5</sup>

Bartkiewicz worked 33.25 hours during the first quarter of 1985. He tried to pass himself off as a "student," at trial, but he was paid \$10 per hour, far more than the \$3.65 per hour that the real students were paid. The discrepancy is so great that it causes me to believe, and find, that Respondent employed Bartkiewicz as a journeyman, and I will order his remedy at journeyman rates.<sup>6</sup>

Finally, although not individually named in the Board's remand, Kenneth Kuchinski is within the "helper" class of employees covered. Kuchinski entered into an apprenticeship program in January, 1987, and the previous order grants him remedy from that point. However, during the last two quarters of 1986, Kuchinski performed 205.30 hours of unit work, as Respondent's records show. Kuchinski necessarily worked as a helper during those quarters, and he is entitled to the same remedy as the other helpers during their first 8 months.

Backpay computations are shown in Appendix A. Computations for required additional IBEW fund contributions are shown in Appendix B. As I did in my original decision, I averaged the 4 weeks before, and the 4 weeks after, the November 1985 period for which records had been innocently destroyed.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>7</sup>

#### ORDER

The Respondent, Schmidlin, Inc., Toledo, Ohio, its officers, agents, successors, and assigns, shall

1. In addition to moneys ordered previously by the Board, pay the employees listed below the sums set opposite their respective names, with interest,<sup>8</sup> in accordance with appropriate deductions for taxes that are required to be held by Respondent under Federal and state laws:

<sup>5</sup>The wage for apprentices during their second 8-month tenure is \$9.13 per hour; the benefit fund contributions are the same as in the first 8 months, except that NEBF is 28 cents.

<sup>6</sup>The per hour journeyman amounts are: wages, \$16.77; Pension Fund, \$1; Health and Welfare Fund, \$1.85; and Apprenticeship Administration Fund, 19 cents. Required contributions to the NEBF are 3 percent of gross pay.

<sup>7</sup>If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

<sup>8</sup>See *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

<sup>4</sup>The required amounts for apprentices in their first 8 months are, per hour: wages, \$7.56; Pension Fund, \$1; Health and Welfare Fund, \$1.50; Apprenticeship Administration Fund, 19 cents; and the National Electrical Benefit Fund (NEBF), 23 cents.

<i>Employee</i>	<i>Amount</i>
Robert Bartkiewicz	\$225.10
Kenneth Kuchinski	1,082.36
Douglas Lynch	606.17
James Schmidlin	3,828.02
Erol Smolenski	1,026.64
Chris Strause	391.17

2. In addition to the amounts ordered previously by the Board, pay to the International Brotherhood of Electrical Workers' funds listed below, on behalf of the employees indicated, the amounts set opposite each such employee's name.<sup>9</sup> If any of the funds refuse to accept such moneys on behalf of each such employee, the amounts indicated shall be paid to the individual employees.

<i>Employee</i>	<i>Pension</i>	<i>Health and Welfare</i>	<i>Apprenticeship Administration</i>	<i>National Electrical Benefit</i>
Robert Bartkiewicz	\$33.25	\$61.51	\$6.32	\$16.73
Kenneth Kuchinski	289.35	434.03	54.98	66.55
Douglas Lynch	147.25	220.88	27.99	33.88
James Schmidlin	925.34	1,388.03	175.82	227.94
Erol Smolenski	380.60	570.91	72.32	87.54
Chris Strause	96.00	144.00	17.34	10.47
	\$1,871.79	\$1,532.03	\$354.77	\$443.11

3. Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

<sup>9</sup> Any additional amounts due the funds shall be paid in accordance with the criteria set forth in *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979).

#### APPENDIX A

<i>Year/Quarter</i>	<i>Pay Period</i>	<i>Unit Hours</i>	<i>Gross Backpay</i>	<i>Interim Earnings</i>	<i>Net Backpay</i>
<i>Richard Bartkiewicz' Backpay</i>					
1985/01	01/26	15.00	\$251.55	\$150.00	\$101.55
	02/02	12.75	213.82	127.50	86.32
	02/16	2.00	33.54	20.00	33.54
Bartkiewicz in 1985/01		33.25	\$557.60	\$332.50	\$225.10
Total Backpay Due Bartkiewicz					\$225.10
<i>Kenneth Kuchinski's Backpay</i>					
1986/03	09/06	10.05	\$77.99	\$42.00	\$35.99
	09/13	22.00	170.72	88.00	82.72
	09/20	32.50	252.20	132.00	120.20
	09/27	19.50	151.32	78.00	73.32
Kuchinski in 1986/03		84.05	\$652.23	\$340.00	\$312.23
1986/04	10/04	19.25	\$149.38	\$77.00	\$72.38
	10/11	20.50	159.08	82.00	77.08
	10/23	14.00	108.64	56.00	52.64
	11/01	16.50	128.04	66.00	62.04
	11/08	34.50	267.72	138.00	129.72
	11/15	8.05	62.47	34.00	28.47
	11/22	42.00	325.92	168.00	157.92
	11/29	16.50	128.04	66.00	62.04
	12/06	34.00	263.84	136.00	127.84
Kuchinski in 1986/04		205.30	\$1,593.13	\$823.00	\$770.13
Additional Backpay Due Kuchinski					\$1,082.36
<i>Douglas Lynch's Backpay</i>					
1985/01	01/26	4.50	\$34.92	\$16.43	\$18.49
	02/16	5.00	38.80	18.25	20.55

## APPENDIX A—Continued

<i>Year/Quarter</i>	<i>Pay Period</i>	<i>Unit Hours</i>	<i>Gross Backpay</i>	<i>Interim Earnings</i>	<i>Net Backpay</i>
	03/02	5.00	38.80	18.25	20.55
	03/16	24.00	186.24	87.60	98.64
Lynch in 1985/01		38.50	\$298.76	\$140.53	\$158.23
1985/02	04/13	2.50	\$19.40	\$9.12	\$10.28
	05/04	13.00	100.88	47.45	53.43
	05/18	21.50	166.84	78.48	88.36
	06/22	4.75	36.86	17.35	19.51
	06/29	19.50	151.32	71.18	80.14
Lynch in 1985/02		61.25	\$475.30	\$223.58	\$251.72
1985/03	07/13	8.50	\$65.96	\$31.02	\$34.94
	07/20	12.00	93.12	43.80	49.32
	07/27	15.50	120.28	56.58	63.70
	08/03	7.50	58.20	26.38	31.82
	08/10	4.00	31.04	14.60	16.44
Lynch in 1985/03		47.50	\$368.60	\$172.38	\$196.22
Total Backpay Due Lynch					\$606.17
<i>James Schmidlin's Backpay</i>					
1985/03	08/10	23.00	\$178.48	\$77.05	\$101.43
	08/31	15.99	124.08	56.25	67.83
	09/07	10.00	77.60	37.50	40.10
	09/14	17.00	131.92	64.69	67.23
	09/21	17.50	135.80	65.13	70.67
	09/28	23.00	178.48	86.25	92.23
J. Schmidlin in 1985/03		106.49	\$826.36	\$386.87	\$439.49
1985/04	10/05	36.50	\$283.24	\$139.69	\$143.55
	10/12	31.75	246.38	117.18	129.20
	10/19	22.50	174.60	90.00	84.60
	10/26	7.00	54.32	28.00	26.32
	11/02	14.50	112.52	58.00	54.52
	11/09	14.50	112.52	58.00	54.52
	11/16	14.50	112.52	52.00	60.52
	11/23	14.50	112.52	52.00	60.52
	12/07	4.00	31.04	16.00	15.04
	12/14	4.50	34.92	18.00	16.92
	12/21	5.50	42.68	22.00	20.68
	12/28	4.00	31.04	16.00	15.00
J. Schmidlin in 1985/04		173.00	\$1,342.48	\$666.87	\$675.61
1986/01	01/18	6.50	\$50.44	\$26.00	\$24.44
	01/25	3.00	23.28	12.00	11.28
	02/01	4.00	31.04	16.00	15.04
	02/08	5.50	42.68	22.00	20.68
	03/01	1.50	11.64	6.00	5.64
	03/08	4.00	31.04	16.00	15.04
	03/29	1.50	11.64	6.00	5.64
J. Schmidlin in 1986/01		26.00	\$201.76	\$104.00	\$97.76
1986/02	05/03	6.00	\$54.78	\$24.00	\$30.78
	06/07	15.00	136.95	47.50	89.45
	06/14	8.50	7.60	34.00	43.60
J. Schmidlin in 1986/02		29.50	\$269.34	\$105.50	\$163.84
1987/01	01/03	16.00	\$146.08	\$80.00	\$66.08
	01/10	15.50	141.52	77.50	64.02

## APPENDIX A—Continued

<i>Year/Quarter</i>	<i>Pay Period</i>	<i>Unit Hours</i>	<i>Gross Backpay</i>	<i>Interim Earnings</i>	<i>Net Backpay</i>
	01/17	39.50	360.64	197.50	163.14
	01/24	40.00	365.20	200.00	165.20
	o/t	1.50	13.70	7.50	6.20
	01/31	26.25	239.66	131.25	108.41
	02/07	35.50	324.12	177.50	146.62
	02/21	8.00	73.04	40.00	33.04
	02/28	30.50	278.47	152.50	125.97
	03/07	24.00	219.12	120.00	99.12
	03/14	38.30	349.68	191.50	158.17
	03/21	8.00	73.04	40.00	33.04
	03/28	27.30	249.25	136.50	112.75
J. Schmidlin in 1987/01		310.35	\$2,833.50	\$1,551.75	\$1,281.75
1987/02	04/04	39.25	\$358.35	\$196.50	\$161.85
	04/11	30.00	273.90	150.00	123.90
	04/18	28.00	255.64	140.00	115.64
	04/25	24.50	223.69	122.50	101.19
	05/02	38.50	351.51	192.50	159.01
	05/09	37.50	342.38	187.50	154.88
	05/16	31.50	287.60	157.50	130.10
	05/23	25.00	228.25	125.00	103.25
	05/30	29.00	264.77	145.00	119.77
J. Schmidlin in 1987/02		283.25	\$2,586.07	\$1,416.50	\$1,169.57
Total Backpay Due J. Schmidlin					\$3,828.22
<i>Erol Smolenski's Backpay</i>					
1986/03	07/26	17.75	\$137.74	\$79.88	\$57.86
	08/02	15.00	116.40	73.68	42.72
	08/23	18.75	145.50	84.38	61.12
	09/06	4.75	36.86	21.38	15.48
Smolenski in 1986/03		56.25	\$436.50	\$259.32	\$177.18
1987/01	01/03	29.25	\$226.98	\$131.63	\$95.35
	01/10	25.00	194.00	112.50	81.50
	01/17	31.25	242.50	140.63	101.87
	01/24	21.75	168.78	92.88	75.90
	02/04	32.50	252.20	146.50	105.70
	o/t	5.00	38.80	33.75	5.05
	02/14	29.75	230.86	133.88	96.98
	02/28	24.00	186.24	108.00	78.24
	o/t	1.75	13.58	11.81	1.77
	03/07	32.25	250.26	145.13	105.13
	o/t	0.50	3.88	3.38	0.50
	03/14	38.30	297.21	191.50	105.71
	03/21	26.30	204.09	118.35	85.74
	03/28	26.75	207.58	120.38	87.20
Smolenski in 1987/01		324.35	\$2,516.96	\$1,490.32	\$1,026.64
Total Backpay Due Smolenski					\$1,203.82
<i>Chris Strause's Backpay</i>					
1985/01	03/30	1.50	\$11.64	\$8.67	\$2.97
1985/02	04/13	22.75	176.54	83.04	93.50
	05/11	6.50	50.44	23.73	26.71
	05/25	11.00	85.36	40.15	45.21
	06/08	22.00	170.72	80.30	90.42
	06/15	8.00	62.08	29.20	32.88
	06/22	6.50	50.44	23.73	26.71

## APPENDIX A—Continued

<i>Year/Quarter</i>	<i>Pay Period</i>	<i>Unit Hours</i>	<i>Gross Backpay</i>	<i>Interim Earnings</i>	<i>Net Backpay</i>
	06/29	12.50	97.00	45.63	51.37
Strause in 1985/02		49.00	\$380.24	\$178.86	\$201.38
1985/03	07/06	4.00	\$31.04	\$14.60	\$16.44
	07/20	32.00	248.32	116.80	131.52
	07/27	9.50	73.72	34.86	38.86
Totals for 1985/03		45.50	\$353.08	\$166.26	\$186.82
Total Backpay Due Strause					\$391.17

## APPENDIX B

## ADDITIONAL IBEW FUND CONTRIBUTIONS REQUIRED

<i>Employee</i>	<i>Year/Quarter</i>	<i>Unit Hours</i>	<i>Pension</i>	<i>Health and Welfare</i>	<i>Apprenticeship Administration</i>	<i>National Electrical Benefit</i>
Bartkiewicz	1985/01	33.25	\$33.25	\$61.51	\$6.32	\$16.73
Total Contributions for Bartkiewicz			\$33.25	\$61.51	\$6.32	\$16.73
Kuchinski	1986/03	84.05	\$84.05	\$126.08	\$15.97	\$19.33
	1986/04	205.30	205.30	307.95	39.01	47.22
Additional Contributions for Kuchinski			\$289.35	\$434.03	\$54.98	\$66.55
Lynch	1985/01	38.50	\$38.50	\$57.75	\$7.32	\$8.86
	1985/02	61.25	61.25	91.88	11.64	14.09
	1985/03	47.50	47.50	71.25	9.03	10.93
Total Contributions for Lynch			\$147.25	\$220.88	\$27.99	\$33.88
J.Schmidlin	1985/03	106.49	\$106.49	\$159.74	\$20.23	\$24.49
	1985/04	169.75	169.75	254.63	32.25	23.00
	1986/01	26.00	26.00	39.00	4.94	5.98
	1986/02	29.50	29.50	44.25	5.61	8.26
	1987/01	310.35	310.35	465.53	58.97	86.90
	1987/02	283.25	283.25	424.88	53.82	79.31
Total Contributions for J. Schmidlin			\$925.34	\$1,388.03	\$175.82	\$227.94
Smolenski	1986/03	56.25	\$56.25	\$84.38	\$10.69	\$12.94
	1987/01	324.35	324.35	486.53	61.63	74.60
Total Contributions for Smolenski			\$380.60	\$570.91	\$72.32	\$87.54
Strause	1985/01	1.50	\$1.50	\$2.25	\$0.29	\$0.35
	1985/02	49.00	49.00	73.50	9.31	11.27
	1985/03	45.50	45.50	68.25	7.74	10.47
Total Contributions for Strause			\$96.00	\$144.00	\$17.34	\$22.09